Filed 7/2/12 In re Misael E. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MISAEL E., a Person Coming Under the Juvenile Court Law.	B235122 (Los Angeles County Super. Ct. No. PJ47646)
THE PEOPLE, Plaintiff and Respondent, v. MISAEL E., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Fred J. Fujioka, Judge. Affirmed as modified.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Taylor Nguyen, Deputy Attorneys General for Plaintiff and Respondent.

Appellant Misael E. (minor) appeals from a judgment of the juvenile court, challenging the sufficiency of the evidence to support a finding that he committed a forcible lewd act upon a child under the age of 14 years. We conclude that substantial evidence supports the court's finding. Minor also challenges as overbroad three conditions of his probation, one restricting family contact and two restricting associations. We conclude that the juvenile court adequately narrowed the condition regarding family contact but omitted the provision from the minute order; we thus order the court to insert the missing provision into the minutes. We modify the remaining two conditions by inserting a knowledge provision. With such modifications, we otherwise affirm the judgment.

BACKGROUND

In an amended petition filed pursuant to Welfare and Institutions Code section 602 to bring minor within the jurisdiction of the juvenile court, count 1 alleged that in 2009, minor committed a lewd act upon a child, in violation of Penal Code section 288, subdivision (a).[1] Count 2 alleged that minor committed a forcible lewd act upon a child, in violation of section 288, subdivision (b)(1). A third count, alleging a violation of section 289, subdivision (a)(1), was dismissed on minor's motion after the adjudication hearing. The juvenile court sustained counts 1 and 2. On July 26, 2011, the court declared minor a ward of the juvenile court and ordered minor suitably placed upon specified terms and conditions. Minor filed a timely notice of appeal from the judgment.

At the adjudication hearing, minor's nine-year-old sister Jennifer G. testified that when she was in the second grade, minor touched her inappropriately two or three times while the two siblings were watching television in their mother's bedroom. In the first incident, minor kissed Jennifer, reached under her clothing and touched her "private part in the middle" where her "pee comes out." He penetrated her with his fingers for about 50 seconds, told her not to tell their mother and then left the room. A week or two later, minor took Jennifer's hand, placed it on his bare penis, and squeezed her hand over it,

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

causing her hand to hurt slightly. Jennifer tried to pull her hand away, but was unable to do so until minor released it after about 50 seconds. Minor then left the room after saying, "Don't tell mom." During the third incident, their sister saw minor kissing Jennifer and told their mother.

Minor's sister E.E. testified that the incident she observed occurred in 2009. She saw Jennifer lying on the bed with minor on top of her, kissing her neck. When she asked her younger siblings what they were doing, minor was reluctant to answer, seemed nervous, and replied they were not doing anything. E.E. telephoned her mother to report what had occurred.

Minor's mother Linda M. discussed what had occurred with minor, and told him that it was wrong. She testified that he appeared to be scared or embarrassed. Minor was never left alone with Jennifer again.

Los Angeles Police Officer Ignacio Murillo testified that as part of his investigation, he interviewed minor and Jennifer in January 2011. Minor admitted to kissing Jennifer multiple times. Minor admitted that he forced Jennifer into touching his penis and that he penetrated Jennifer's vagina with his finger. Minor cried and said he knew what he did was wrong.

DISCUSSION

I. Substantial evidence supports count 2

Minor contends that there was insufficient evidence to support the juvenile court's finding that he committed a forcible lewd act upon Jennifer in violation of section 288, subdivision (b). In particular, minor contends that there was insufficient evidence of force.

A challenge to the sufficiency of the evidence to support a juvenile court judgment sustaining criminal allegations is reviewed under the same standard of review applicable to any criminal appeal. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371 (*Ryan N.*).) Thus we review the whole record in the light most favorable to the prosecution to determine whether it discloses evidence that is "reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *Ryan N.*, *supra*, at p. 1372.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "Before the judgment of the trial court can be set aside for insufficiency of the evidence . . . , it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it. [Citation.]" (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *Ryan N.*, at p. 1372.)

Under section 288, subdivision (a), it is a crime to commit a lewd or lascivious act on a child under age 14 with the intent to arouse or satisfy the sexual desires of the perpetrator or the child. Any touch with the requisite sexual intent is a violation of subdivision (a). (*People v. Martinez* (1995) 11 Cal.4th 434, 440-441, 452.) Subdivision (b)(1) of section 288 prohibits the commission of such an act "by use of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." "[T]he force used for a subdivision (b) conviction [must] be 'substantially different from or substantially greater than that necessary to accomplish the lewd act itself.' [Citation.]" (*People v. Soto* (2011) 51 Cal.4th 229, 242 (*Soto*).)

Minor contends that the acts of taking and squeezing the victim's hand were not substantially different from or greater than the force necessary to accomplish the lewd touching. We disagree. The evidence established that minor took Jennifer's hand, placed it on his penis, squeezed her hand over his penis as she tried to pull it away, and continued to squeeze for about 50 seconds. Such "acts of grabbing, holding and restraining that occur in conjunction with the lewd acts themselves" have been held to constitute force. (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1005.) Indeed, just '"a modicum of holding"' may be sufficient to violate section 288, subdivision (b). (*Alvarez*, at p. 1004.) For example, in *People v. Babcock* (1993) 14 Cal.App.4th 383, 385-386 (*Babcock*), sufficient force was established with evidence demonstrating that the defendant took the victim's hand and "made her touch his crotch for 'a couple minutes'";

and in *People v. Pitmon* (1985) 170 Cal.App.3d 38, 48 (*Pitmon*), the defendant's "manipulation of the [victim's] hand as a tool to rub [the defendant's] genitals" while holding the victim's hand throughout the act "was a use of physical force beyond that necessary to accomplish the lewd act."[2]

Minor argues that *Babcock* is distinguishable because the evidence showed in that case that the victim *resisted* the lewd acts. Minor points to language in *Babcock* to the effect that evidence of resistance may be helpful in determining whether force was used, which minor construes as *requiring* evidence of resistance. (See *Babcock supra*, 14 Cal.App.4th at p. 387.) As respondent notes, resistance is not an element of forcible lewd touching and no evidence of resistance is required to prove a violation of section 288, subdivision (b)(1). (*Babcock supra*, at p. 387; *People v. Cicero* (1984) 157 Cal.App.3d 465, 484-485 (*Cicero*), overruled on other points in *Soto*, *supra*, 51 Cal.4th at pp. 245-248; *People v. Stark* (1989) 213 Cal.App.3d 107, 112.) Thus, as we construe the language in *Babock*, evidence of resistance could serve to establish force; however, the absence of resistance would not defeat a finding of force. In any event the evidence showed that Jennifer did, in fact, resist minor for nearly a minute by trying to pull her hand away, but was prevented from doing so by minor's squeezing her hand so hard that it hurt.

Minor acknowledges in reply that there was evidence of resistance and that resistance is not an element of forcible lewd touching, but contends that a finding of force must be supported by evidence that the perpetrator was *aware* of his victim's resistance. Minor's reasoning lacks merit, as well as logic, as requiring evidence showing that the perpetrator was *aware* of resistance is no different from requiring evidence of resistance. We thus reject the contention that the evidence of force was insufficient without proof of minor's awareness of resistance.

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[2] *Pitmon* was overruled on a different point in *Soto*, *supra*, 51 Cal.4th at page 248, as explained within.

Finally, we decline minor's request to disregard *Pitmon*'s example because the court's conclusion as to force was dictum. Rather, we find it persuasive. We disagree with minor's contention that the dissent in *Babcock* is more compelling than the majority opinion. Relying on *Cicero*, *supra*, 157 Cal.App.3d at pages 481-482, Justice Kline disagreed with the conclusion of the majority because there had been no proof that the lewd act was accomplished against the victim's will. (See *Babcock*, *supra*, 14 Cal.App.4th at pp. 389-390 (dis. opn. of Kline, J.).) This was the same "flawed reasoning" rejected by the California Supreme Court in *Soto*, *supra*, 51 Cal.4th at pages 233, 245-248. *Cicero* and cases following it, including *Pitmon*, were disapproved to the extent they held or suggested that consent could provide a defense to aggravated lewd acts, or that lewd acts could be accomplished by duress, menace, or fear, only if committed "'against the will of the victim.'" (*Soto*, *supra*, 51 Cal.4th at pp. 233, 245-248; see *Cicero*, *supra*, at pp. 481-482; *Pitmon*, *supra*, 170 Cal.App.3d at p. 51.)

We conclude that the evidence was sufficient to permit a reasonable trier of fact to find that minor committed a forcible lewd act upon the victim.

II. Probation condition regarding visits

Minor challenges the following condition of probation (condition No. 17): "Don't contact or cause any contact with [or] associate with the victims or witnesses of any offense alleged against you." Minor contends that the condition is overbroad and unconstitutionally interferes with his freedom of association, with the effect of banishing him from his home.

Respondent contends that minor has forfeited this contention by failing to object to the condition in the juvenile court. Failure to object below to conditions of probation forfeits a challenge on appeal, including challenges made on constitutional grounds, unless the circumstances "'present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court."' [Citation.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).) Respondent contends that minor's challenge does not fall within this exception, because "there was a specific discussion at the disposition hearing about how to 'handle home visits from suitable

placement.'" On the contrary, the discussion shows that minor's concern was raised, although not as a constitutional challenge.

We observe that the discussion ensued from defense counsel's request that the court recommend a program near minor's home so that mother could visit him, and so minor could eventually have home visits. Thus, the issue was raised and prompted the juvenile court to ask the court officer to suggest language that would address home visits and allow for family reunification without endangering the sibling. The court officer suggested that the language remain general, as the therapist would determine when and under what conditions visits would be appropriate. At the court officer's request, the juvenile court ordered that prior to visits with mother or home visits, the court and counsel be advised, and the therapist to provide a recommendation.

This summary of the proceedings demonstrates that the juvenile court did, in fact, narrow the condition that minor now challenges as overbroad. We construe the court's order as giving discretion to minor's therapist to permit visits and to determine the appropriate time and conditions, with notice to the court and counsel prior to home visits.

As minor acknowledges, a juvenile court may impose conditions that are broader than those imposed upon adult offenders. (*In re Christopher M.* (2005) 127 Cal.App.4th 684, 693.) "'[B]ecause juveniles are deemed to be more in need of guidance and supervision than adults . . . a minor's constitutional rights are more circumscribed. . . .' [E]ven conditions infringing on constitutional rights may not be invalid if they are specifically tailored to fit the needs of the juvenile. [Citation.]" (*Ibid.*) Indeed, as minor recognizes, a court may impose reasonable restrictions on contact with family members. (See *People v. Wardlow* (1991) 227 Cal.App.3d 360, 367.) Here, the juvenile court tailored condition No. 17 to fit the needs of the minor by conferring discretion on minor's therapist to determine timing and conditions of visits.[3] The court does not act

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[3] Minor does not contend that such a condition is unreasonable or overbroad; instead, he assumes that the therapist will not allow visits, and thus he deems it to be meaningless. We decline to presume that the therapist will abuse his or her discretion.

unreasonably in giving discretion to an appropriate authority to make such determinations. (Cf. *In re Ramon M*. (2009) 178 Cal.App.4th 665, 677 [probation officer given discretion to approve associates].)

The only flaw we find in the court's order is that it is not reflected in the court's minutes. The minute order lists each condition of probation, but fails to include the court's modification regarding visits. "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated . . . .' [Citation.]" (*Sheena K., supra*, 40 Cal.4th at p. 890.) The reviewing court may modify the condition to make it sufficiently explicit. (*Id*. at p. 892.) We do so here by directing the juvenile court to make the minute order conform to its oral pronouncement.

III. Probation conditions regarding children and schools

Probation condition No. 18 requires minor not to associate with any children under the age of 14 years unless he is in the physical presence of a responsible adult. Condition No. 12 prohibits minor from being "within one block of any school ground unless enrolled, attending classes, on approved school business, or with school official, parent, or guardian." Minor asks that we modify the conditions to add a knowledge requirement. Respondent agrees.

Probation conditions restricting association with others should include a requirement that the probationer have knowledge that the person with whom he associates comes within the restricted category. (*Sheena K., supra*, 40 Cal.4th at pp. 891-892.) Where the trial court has not included a knowledge provision, the reviewing court should do so. (*Id*. at p. 892.) Accordingly, we modify the conditions as minor requests.

DISPOSITION

Probation condition No. 12 is modified to read: "Do not knowingly be within one block of any school ground unless enrolled, attending classes, on approved school business, or with school official, parent or guardian." Probation condition No. 18 is modified to read: "Do not knowingly associate with any children under the age of 14 years except in the physical presence of a responsible adult." The juvenile court is

directed to prepare an amended minute order with the modified conditions, and is further directed to include the court's orally pronounced order with regard to home and family visits, conferring discretion on minor's therapist to determine timing and conditions of visits, conditioned upon notice to counsel and the court. As so modified, and in all other respects, the judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST